Wu Siew Ying v Gunung Tunggal Quarry & Construction Sdn Bhd & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO 22–58 OF 1988
KANG HWEE GEE J
15 JULY 1999

Tort *— Negligence — Adjoining properties — Duty of care, whether exist — Cause of damage — Conflicting experts' opinions — Allegation that quarry work on defendant's land caused collapse of land — Whether quarry work must be proved to be prime cause of collapse — Plaintiff to prove standard of care — Whether Director of Land and Mines owed duty of care to plaintiff*

Tort *— Nuisance — Collapse of rock debris on plaintiff's land — Plaintiff to prove harm was caused by defendant's activity on his land and not due to latent defect of limestone hill — Whether proved*

The plaintiff was the owner of a plant nursery. The first defendant was the operator of a quarry on a natural limestone hill on a plot of land adjacent to and above the plaintiff's land. The second defendant was the registered proprietor of the land on which the first defendant operated the quarry. The third defendant was a Director of the Land and Mines which issued the permit to the first and second defendant to remove rock materials under s 70 of the National Land Code 1965. On 29 December 1987, following a heavy rainfall, a large slice of the hill collapsed causing limestone rock debris to fall onto the plaintiff's land and destroying the plaintiff's nursery. When the hill collapsed, the first defendant's quarry was not in operation. The plaintiff sued all defendants for negligence and alternatively for nuisance. The parties relied on the opinion of their experts to postulate on the cause of the collapse. There was a divergence of opinion between the experts in respect of the cause of the collapse. While the plaintiff's expert had attributed the collapse directly to the vibrations from the first defendant's quarry, the defendant's experts attributed it to latent defects of the hill itself as manifested in the many faults and joints and unstable overhangs which ultimately over a period of time would lead to its collapse, the vibrations from the quarry operations being merely a secondary factor which may have aggravated the collapse.

Held, dismissing the action:

(1) The same particulars of negligence had been pleaded against the second defendant as they were against the first defendant. It is abundantly clear that the second defendant was not the operator of the quarry and could not therefore have been responsible for the omissions mentioned in the particulars (see p 16H–I).

(2) That a duty of care situation existed between the first defendant and the plaintiff is plain and obvious. The plaintiff was the first defendant's neighbour in the literal sense of the word. He was the occupier of the land adjoining the quarry. That the operator owed

a duty of care to the plaintiff is also plain and obvious. Operating a quarry by its very nature must necessarily involve the foreseeability of harm to the land of the immediate neighbour should he be careless in his operation (see p 17G–I).

(3) In order to find a defendant liable in negligence or nuisance, the plaintiff must prove that the defendant's act was the effective cause of the injury or damage suffered. In the present case, considering that the collapse did not occur when the quarrying was in operation, but six days after it had shut down for the New Year holidays, the postulation of the plaintiff's expert did not explain how the energy from the blasting could have been stored at the site for that long to have led to the rockburst that caused the collapse. The expert's finding that the collapse of the hill was due to rockburst as he explained it would be tenable only if the collapse had occurred while quarrying was in progress at the time, but not when the quarry was not in operation. On the other hand, the postulation of the defendant's expert was consistent with the fact that the collapse occurred while the quarry was not in operation. Having found the evidence of the defendant's expert as the more acceptable, the court must conclude that the collapse was less likely to have been brought about by any sudden release of stored energy (rockbursrt) than by the call of gravity on the inherently instable hill (rockfall). Therefore, the causa causan of the collapse of the hill was not the vibrations from the operation of the first defendant's quarry. The fact that it may be a contributory cause was not enough — it must be the prime cause (see pp 21D–E, 23D–H).

(4) To come to a finding that the operator had breach the duty of care owed by him to the plaintiff, it is incumbent upon the plaintiff to establish what the standard should have been. Then and only then would it be possible to assess whether there had been a breach of that duty. In the present case, no evidence was forthcoming with regard to the standard of care that was required of a reasonably competent operator so as to enable the court to reach a finding whether the first defendant had breached his duty of care (see p 26A, F).

(5) To succeed in nuisance, the plaintiff had to prove that the harm he suffered was the effect of the defendant's activity and not the latent defect of the limestone hill. Having failed to prove conclusively that the collapse of the hill was caused by the quarrying operation of the defendant, it follows that he would also fail in nuisance (see p 29C–D).

(6) Having examined the relevant provisions with respect to the position of the Director of Lands and Mines under the National Land Code 1965, in particular the scope of his duty under s 70, the court agreed that the director owed no duty of care to the plaintiff. The director was merely confererd with the power to

issue the permit without the power nor the duty to supervise the removal of rock materials. It follows that no duty of care to ensure that the rock materials were adequately supervised under the common law could exist under the circumstances (see pp 31D, 32C–D); *Anns v Londong Borough of Merton* [1977] 2 All ER 492 distinguished.

(7) It was plain and obvious that the director could not be made liable in nuisance as he was neither the occupier of the land from where the nuisance was alleged to have originated nor was he the cause of it (see p 32E).

[Bahasa Malaysia summary

Plaintif merupakan pemilik sebuah tapak semaian tumbuhan. Defendan pertama merupakan seorang operator kuari di sebuah bukit batu kapur semulajadi di atas plot sekeping tanah bersebelahan dengan dan di atas tanah plaintif. Defendan kedua merupakan pemilik berdaftar tanah di mana defendan pertama menjalankan kuari itu. Defendan ketiga merupakan Pengarah Tanah dan Lombong yang mengeluarkan permit kepada defendan pertama dan kedua untuk mengalihkan bahan-bahan batuan di bawah s 70 Kanun Tanah Negara 1965. Pada 29 Disember 1987, berikutan hujan lebat, sebahagian besar bukit itu telah runtuh menyebabkan debu batuan batu kapur jatuh ke atas tanah plaintif dan merosakkan tapak semaian plaintif. Semasa bukit itu runtuh, kuari defendan pertama tidak beroperasi. Plaintif telah menyaman semua defendan kerana kecuaian dan secara alternatif kacau ganggu. Pihak-pihak telah bergantung kepada pendapat pakar-pakar mereka untuk mempostulatkan sebab keruntuhan itu. Terdapat perbezaan pendapat antara pakar-pakar itu berhubung dengan sebab keruntuhan itu. Pakar plaintif telah menganggap keruntuhan itu berlaku akibat gegaran daripada kuari defendan pertama, manakala pakar defendan menganggap ia berlaku akibat kelemahan terpendam dalam bukit itu sendiri sebagaimana yang dapat dilihat daripada kelemahan dan tempat sambungan yang banyak jarangkau-jarangkau yang tidak stabil yang mana akhirnya di dalam jangkamasa yang tertentu akan menyebabkan ia runtuh, gegaran-gegaran daripada operasi kuari itu yang hanya merupakan faktor sekunder yang mungkin telah menyebabkan keruntuhan itu.

Diputuskan, menolak tindakan tersebut:

(1) Butiran-butiran yang sama di dalam kecuaian telah dirayu terhadap defendan kedua kerana mereka bertentangan dengan defendan pertama. Adalah amat jelas bahawa defendan kedua bukan operator kuari itu dan oleh itu tidak mungkin boleh bertanggungjawab terhadap peninggalan-peninggalan yang dinyatakan di dalam butiran itu (lihat ms 16H–I).

(2) Bahawa situasi kewajipan berjaga-jaga wujud antara defendan pertama dan plaintif adalah jelas dan nyata. Plaintif merupakan

jiran defendan pertama di dalam maksud literal perkataan tersebut. Beliau merupakan penghuni tanah bersebelahan dengan kuari itu. Bahawa operator itu mempunyai kewajipan berjaga-jaga terhadap plaintif adalah juga jelas dan nyata. Untuk menjalankan operasi kuari dengan semulajadinya amat perlu melibatkan ramalan kerosakan kepada tanah jiran terdekat jika beliau cuai di dalam operasi beliau (lihat ms 17G–I).

(3) Bagi mendapati defendan bertanggungjawab terhadap kecuaian atau kacau ganggu, plaintif mesti membuktikan bahawa tindakan defendan adalah sebab utama kecederaan atau kerosakan yang dialami. Di dalam kes ini, dengan mengambil kira bahawa runtuhan itu tidak berlaku semasa kuari itu beroperasi, tetapi enam hari selepas ia ditutup untuk cuti Tahun Baru, postulan pakar plaintif tidak menerangkan bagaimana tenaga daripada letupan mungkin telah disimpan di tapak itu untuk beberapa lama dan telah menyebabkan letupan batuan yang mengakibatkan keruntuhan itu. Penemuan pakar bahawa runtuhan bukit itu disebabkan oleh letupan batuan sebagaimana yang diterangkan oleh beliau dapat dipertahankan hanya jika runtuhan itu telah berlaku semasa kuari itu sedang berjalan ketika itu, tetapi bukan semasa kuari itu tidak beroperasi. Sebaliknya, postulan pakar defendan adalah konsisten dengan fakta bahawa runtuhan itu berlaku ketika kuari itu tidak beroperasi. Setelah mendapati keterangan pakar sebagai yang lebih boleh diterima, mahkamah perlu memutuskan bahawa runtuhan itu kurang berkemungkinan telah disebabkan oleh apa-apa lepasan simpanan tenaga (letupan batuan) yang tiba-tiba berbanding dengan akibat graviti bukit yang jelas tidak stabil itu (runtuhan batuan). Oleh itu, causa causan runtuhan bukit itu bukanlah disebabkan oleh gegaran daripada operasi kuari defendan pertama. Fakta bahawa ia mungkin merupakan sebab sertaan tidak mencukupi — ia perlu merupakan sebab utama (lihat ms 21D–E, 23D–H).

(4) Untuk sampai kepada penemuan bahawa operator itu telah melanggar kewajipan berjaga-jaga yang perlu dipunyai oleh beliau, adalah menjadi kewajipan kepada plaintif untuk menunjukkan apakah piawai yang diperlukan. Oleh itu dan oleh itu sahaja, ia boleh menilai sama ada wujud pelanggaran kewajipan itu. Di dalam kes ini, tiada keterangan yang mendatang berhubung dengan piawai berjaga-jaga yang diperlukan daripada seorang operator yang kompeten bagi membolehkan mahkamah mencapai suatu penemuan sama ada defendan pertama telah melanggar kewajipan berjaga-jaga beliau (lihat ms 26A, F).

(5) Untuk berjaya dalam kacau-ganggu, plaintif mestilah membuktikan bahawa kerosakan yang dialaminya adalah kesan daripada aktiviti defendan dan bukannya kecacatan bukit batu kapur tersebut. Oleh kerana gagal membuktikan secara muktamad bahawa runtuhan bukit tersebut adalah diakibatkan

A oleh operasi kuari defendan, berikutan itu, beliau juga akan gagal dalam kacau-ganggu (lihat ms 29C–D).

(6) Selepas meneliti peuntukan-peruntukan yang yang berkaitan berkenaan dengan kedudukan Pengarah Tanah dan Galian di bawah Kanun Tanah Negara 1965, secara khususnya skop tugasnya di bawah s 70, mahkamah bersetuju bahawa pengarah B tidak mempunyai tugas berhati-hati kepada plaintif. Pengarah tersebut hanyalah diberikan kuasa untuk mengeluarkan permit, tanpa kuasa atau tugas untuk menyelia pengeluaran bahan-bahan berbatu. Tidak terdapat apa-apa tugas untuk berhati-hati untuk memastikan bahawa bahan-bahan batu diselia dengan cukup di C bawah common law boleh wujud di bawah keasaan-keadaan tersebut (lihat ms 31D, 32C–D); *Anns v Londong Borough of Merton* [1977] 2 All ER 492 dibeza.

(7) Adalah jelas dan ketara bahawa pengarah tidak boleh dijadikan bertanggungan di dalam kacau-ganggu oleh kerana beliau bukanlah penghuni tanah tersebut di mana kacau-ganggu adalah D dikatakan berpunca dan beliau juga bukan penyebabnya (lihat ms 32E).]

Notes

E For cases on negligence generally, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 315–852.

For cases on nuisance generally, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 853–883.

Cases referred to

F *Allan William Goldman v Rupert William Edeson Hargrave & Ors* [1967] 1 AC 645 (refd)
Anns & Ors v London Borough of Merton [1977] 2 All ER 492 (distd)
Blyth v Birmingham Waterworks (1856) 11 Exch 781 (refd)
Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 (refd)
G *Chan Loo Khee v Lai Siew San & Ors* [1971] 1 MLJ 253 (refd)
Dr Chin Yoon Hiap v Ng Eu Khoon & Ors and other appeals [1998] 1 MLJ 57 (refd)
Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99 (refd)
Hassan bin Munap v Petrodril (B) Sdn Bhd [1988] 1 MLJ 388 (refd)
H *Hole v Chard Union* (1894) 63 LJ Ch 469 (refd)
Hu Sepang v Keong On Eng & Ors [1991] 1 MLJ 440 (refd)
Owners of Ship Swansea Vale v Jessie Mary Rice & Millicent Rice (an infant) [1912] AC 238 (refd)
Leakey & Ors v National Trust for Places of Historic Interest or Natural Beauty [1980] 1 All ER 17 (refd)
I *Leong Bee & Co v Ling Nam Rubber Works* [1970] 2 MLJ 45 (refd)
Lonrho Ltd & Anor v Shell Petroleum Co Ltd & Anor (No 2) [1982] AC 173 (refd)

M'Alister (or Donoghue) (pauper) v Stevenson [1932] AC 562 (refd)
Mak Koon Yong & Anor v Municipal Councillors Malacca [1967] 1 MLJ 256 (refd)
Sundram v Arunjunan & Anor [1994] 3 MLJ 361 (refd)
Vermont & Ors v Prye River Dock Co Ltd (1884) 1 Ky 658 (refd)

Legislation referred to

National Land Code 1965
Public Authorities Protection Act 1948 s 2(a)

Chan Kok Keong (*Nga Kor Ming* with him) (*Chan & Associates*) for the plaintiff.

Moganasundram (*Edwin Seibel & Raam Kumar* with him) (*Mogan & Co*) for the first defendant.

NP Ramachandran (*K Premah* with him) (*NP Ramachandran & Associates*) for the second defendant.

Jazamuddin bin Mohd Nawawi (Assistant Legal Advisor for the State of Perak) (*Raja Rozela bte Raja Toran* (Federal Counsel) with him) for the third defendant

Kang Hwee Gee J:

The background

The plaintiff was the owner of a plant nursery called Fuh Lin Budgrafting Centre which was situated on land Lot No 32752 Mukim of Kampar.

The first defendant was the operator of a quarry on a natural limestone hill called Gunung Tunggal on a plot of land Lot 74258 adjacent to and above the plaintiff's land.

The second defendant was the registered proprietor of the land on which the first defendant operated the quarry. The land was leased out to the first defendant.

The third defendant was a Director of the Land and Mines, Perak which issued the permit to the first defendant and second defendant to remove rock materials under s 70 of the National Land Code 1965.

On both the southern and the eastern faces of the hill were limestone overhangs hanging over but not directly above the plaintiff's land. The plaintiff's nursery was situated some distance away below the hill slightly away from the boundary of his land facing the hill, the exact position of which could be determined by referring to the scaled map exh PIA.

On 29 December 1987 at about 6.30 am, following a heavy rainfall and severe thunderstorm, a large slice of the hill collapsed causing limestone rock debris to fall onto the plaintiff's land below and to spill over to the nursery virtually destroying it.

According to the experts called by the first defendant the collapse of the hill was brought about by two contemporaneous detachments — a fact which the plaintiff did appear to dispute. The first one occurred at the southern end of the hill followed within minutes by another larger

A detachment on the eastern face bringing down the overhang with it. It was the detachment of the eastern face that caused rock debris to spill over to the plaintiff's land and to the Ipoh-Kampar trunk road.

From the scale map tendered by the plaintiff (exh PIA) the area on which the first defendant carried on quarrying activity was along the western B face of the hill, about 330 feet from the adjoining eastern boundary of the plaintiff's land but slightly further away (about 400 feet) from where the plaintiff's nursery actually was.

When the hill collapsed on 29 December 1987, the first defendant's quarry was not in operation having stopped work on 23 December 1987 for the Christmas and New Year holidays.

C After the collapse of the portion of the hill, the state authority took over the control of the hill and caused the remaining unstable rocks of the hill to be removed by blasting so as to avoid any further calamity.

The plaintiff's main claim: negligence

D All the first, second and third defendants were sued on basis that on the allegation that the collapse of the hill was occasioned by their negligence and/or their servant or agent. The particulars of negligence alleged against the first and second defendants are that they had:

(i) failed to develop benches on the quarry face;

E (ii) failed to take into account during blasting operations the vertical and horizontal cleavage plane on the limestone formation;

(iii) failed to ensure that there was efficient drainage system between the hills and the main road;

(iv) failed to ensure that the resultant strength of the ground was adequate F to prevent collapse of the loose eastern duct of the hill;

(v) failed to adopt proper blasting methods; and

(vi) failed to take reasonable steps to remove the hazards on the hill when they became aware of the said hazardous condition of the hill.

G The particulars alleged against the third defendant are that he had:

(i) failed to visit the site and or carry out proper investigations of the site to assess safety precautions before issuing the permit to extract rock materials under s 70 of the National Land Code on 1 January 1987;

(ii) allowed Gunung Tunggal to be quarried in 1987 even though the H distance of the quarry face to the Ipoh Kampar Road was less than 200 metres, in contravention of the relevant guidelines issued by the Works Department that as a matter of safety no quarry operation can be conducted within 1 km (1000 metres) distance from any road;

(iii) failed to give any due consideration to the safety for remedial aspect of the operation when the quarry progressed on the easterly direction I towards Lot 32752 and the Ipoh Kampar Road;

(iv) failed to take safety precaution to prevent the rock burst which could have been forseen as early as 1 January 1987; and

(v) failed to exercise its supervisory jurisdiction to check and monitor compliance of the conditions of the permits by the first defendant.

The plaintiff's alternative claim: nuisance

It was also alleged against all the defendants that at all material times, the collapse was a nuisance caused or permitted by all the defendants.

Progress of this case

This suit was commenced before Ong J some years back. He went on retirement after having heard the plaintiff's case including the detailed technical evidence of the mining engineer, S Pakianathan who gave his version of what had caused the collapse of the hill. The parties were agreed that the suit should be continued by me from where Ong J had left and that the notes of the evidence recorded by Ong J be accepted and evaluated accordingly.

It would appear from the notes of Ong J that at the commencement of the trial before him on 27 May 1991 the parties have agreed that the court should first hear evidence on liability and leave the question of damages to be inquired into only if the question of liability is established.

Mention must be made of the fact that this case has taken a good eight years to complete. It was due in no small part to the delay associated with the logistics of having to fix it for continuation before me and the numerous postponements that had to be made at my requests for counsel to make further submissions with regard to the highly technical evidence of the mining engineer called by the plaintiff whose testimony I had not the benefit of hearing in person. The delay was also attributable to a lesser degree, unavoidably to the ill health of counsel of the first defendant, Mr Moganasundram, whose conduct of the case had been exemplary until the later part of the proceedings when his illness took a turn for the worse. In the end when it got the better of him and led to his untimely demise, the conduct of his client's defence had to be taken over by his able assistants, Mr Edwin Seibel and Mr Raam Kumar.

The claim against the second defendant

It may be appropriate at this earlier stage that I make a ruling in respect to the claim against the second defendant which it is clear had been made a party only because he was the owner of the land and the holder of the permit to remove rock materials which was issued by the third defendant. The same particulars of negligence had been pleaded against the second defendant as they were against the first defendant. It is abundantly clear that the second defendant was not the operator of the quarry and could not therefore have been responsible for the omissions mentioned in the particulars. He had leased out the land for the purpose of the quarry to the first defendant in 1982 and was therefore not the occupier of the land at the time of incident.

A It follows that the claim in both negligence and nuisance against him must accordingly be dismissed forthwith with costs.

In the case of the third defendant however, the negligence alleged against him was based on different particulars, which relates exclusively to his duty as the director of Land and Mines. For convenience therefore, I shall consider his liability on a separate format later in this judgment. B

I shall for the present, confine my assessment of liability only on the first defendant, the operator of the quarry, beginning with the liability in negligence.

C *The requirements of negligence*

In it barest and most practical form, negligence has been defined by Baron Alderson in *Blyth v Birmingham Waterworks* (1856) 11 Exch 781 at p 748 as 'the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do'. See *Chan Loo Khee v Lai Siew San & Ors* [1971] 1 MLJ 253. D

Four requirements need to be proved by the plaintiff before the defendants could be held liable in negligence:

(i) the existence of a duty of care situation between the plaintiff and the defendant; E

(ii) forseeability that such a conduct would have inflicted on the particular plaintiff the particular damage of which he complains;

(iii) casual connection between the defendant's alleged careless conduct and the damage suffered by the plaintiff — the causa causans; and

F (iv) a breach of that duty (ie careless behaviour by the defendant in failing to measure up to the standard and scope set by law);

(See *Clerk & Lindsell on Tort* 1995 17th Ed at 7–04.)

The duty of care and the forseeability of the damage to the plaintiff's land

G That a duty of care situation existed between the first defendant operator and the plaintiff is plain and obvious. The plaintiff was the first defendant's neighbour in the literal sense of the word. He was the occupier of the land adjoining the quarry. He was clearly within that category of persons whom Lord Atkin in the celebrated case of *M'Alister (or Donoghue) (pauper) v Stevenson* [1932] AC 562 at p 580 described as: H

> ... persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

That the operator owed a duty of care to the plaintiff is also plain and obvious — operating a quarry by its very nature must necessarily involeve the foreseeability of harm to the land of the immediate neighbour should he be careless in its operation. I

The plaintiff has satisfied the first two requirements. He must now satisfy the two remaining requirements which I shall now consider in turn.

Evidence on the cause of the collapse

I shall begin with the requirement of causa causans. The plaintiff's case would stand or fall under this requirement alone, as common sense dictates that a claimant must be able to attribute the cause of his misfortune to the act or omission of the person he blames for his loss.

As the quarry was not in operation at the time of incident and the nursery itself was situated some distance away there was no direct evidence of what caused the hill to collapse. Both the plaintiff and the first defendant relied on the opinion of their experts to postulate on the cause of the collapse.

The plaintiff's version

The plaintiff called an expert one S Pakianathan, a consultant in mining, mineral processing and metalurgical engineering. He was engaged by the plaintiff to make a study and to give his professional view as to the cause of the collapse. He attributed the collapse of the hill which caused the damage to the plaintiff's nursery to a force known as rockburst which he found was brought about directly by the operation of the quarry.

He visited the site on 12 January 1988 and 15 January 1988. He studied the area with a survey team and prepared a report (exh P1).

He observed during his site visits that:

1. 'faults are widespread on remaining portion of Gunung Tunggal. Two types of faults were distinguished; (a) shear fault due to compressions and running parallel to the stike of the bed; (b) tension fault running obliquely across the hill (p 15 Notes of Evidence).
2. The blasting had been carried out at two points GS 2 and GS 4 (of the plan in the report), the strength reduces as the distance from the blast point increases. As vibrations arised from the two points there is the central zone which experiences a complex combination of the two vibrations. For purposes of discussion, these vibrations are transformed into stress that contributes to the total operative stresses within the rock mass(p 22 of report exh P1).
3. That the quarry face had been developed in a manner that posed maximum danger to the plaintiff's lot.

He attributed the collapse of the hill to a rockburst.

He explained that the vibration from the quarry operation on the west face (opposite face) of the hill had caused sound, debris and reaction to the rock on the eastern face (ie where the overhang facing the plaintiff's land was) in the following manner:

> The sound waves will travel through the air as a wave train and strongest at the source of blast and when the wave train hit at obstacle it can cause damage to it. From the centre of blast there is also a rock wave travelling through the

A rock and when it hit the eastern face the wave moved back to the west face until it spent itself. When the rock waves meet a fault the total energy is stored in the rock face before the fault thus giving a different distribution of energy within the rock. As such the faults not only are unstable but become energised. The way blasting affects the rock is like adding weight to a spring. When the weight is removed the spring goes back to its original position but after B prolonged tension the spring becomes deformed and eventually breaks. The same principle applies to rock. In the case of Gunung Tunggal the quarrying effectively narrowed the deformed zone so much so the east face become a deformed zone and in its release of energy the rock burst out (see pp 12–13 Notes of Evidence).

C *The first defendant's version*

The first defendant called two experts, Mr Senathi Rajah, a former consultant geologist and Mr Chow Weng Sum, a government geologist attached to the Geological Survey Department Malaysia who, as an officer in Ipoh in 1987, had been assigned to investigate the collapse by his D department.

Mr Senathi Rajah gave evidence that a rockburst and a rockfall are two different phenomena. The collapse of the hill he opined was merely a rockfall and not a rockburst as described by the plaintiff's geologist. He relied on the *Glossary of Geology* by Ian Campbell of the American Geological Institute Washington DC for the definition of rockburst and E rockfall which I shall revert to shortly.

Mr Chow Weng Sum supported Mr Senathi Rajah. He gave evidence that he was instructed by his department to investigate the collapse of the hill. At that time he was stationed at the Geological Survey Department Ipoh. He went to the site on 29 December 1987 with a junior geologist one F Abdul Majid at 9.00 am — barely two and a half hours after the incident where he made some preliminary observations. Subsequently, on 10, 11, 12, 13, 19, 20 and 23 January 1988 he carried out detailed investigations. He prepared a report (exh D3) for his department.

He had observed during his visits to the site, that faults had existed on G north south line on the hill and that there had been unstable overhangs on both the sourthern and eastern face (ie the face facing the plaintiff's land).

The overhangs came about by fluctuation of sea level or by rain water erosion over a period of time undercutting the base of the hill. Because of the undercutting at the base of the hill, the top part of the hill lost its vertical support (see Rajah 6).

H He had observed,

(1) that a 'retakan utama' (vertical main joints) bordering the overhang had been weakened and concluded that there was a joint at where the point where the collapse occurred (see photo 3 in report).

I (2) that there were vegetation on the top of hill which could weaken the joints. Roots of plants can widen the opening of joints of the limestone hill

(3) that eastern face of the hill was unstable due to the presence of undercuts and overhangs. There was a subvertical fault 80 degrees running approximately north to south (Rajah 2). He had observed that the eastern face and southern face was cut by the same fault. Detachments had taken from this fault line. A

The collapse of the southern face caused an inequilibrium on the eastern face to be disturbed thereby resulting in the collapse of the latter. B

The relevant part of his report which contains his finding relating to the cause of the collapse of the hill read as follows:

> Factors leading to rockfall: C
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> Due to the chemical composition of limestone, weathering along planes of weakness such as shears, joints faults, is a natural long term process of denundation on the limestone hills. The cohesive strength across such planes of weakness is reduced and subsequently fails to support the rock slabs or blocks, thus giving rise to a rockfall.
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> Apart from the geological factors mentioned above, a number of secondary causes could also have hasten the rock fall and they are: D
>
> a) incessant rain which can loosen the rock mass
>
> b) vibrations caused by blasting in the quarry
>
> In the case of Gunung Tunggal, the first rockfall occurred at the southern end of the hill where a prominent limonite-stained joint striking 075 degrees and dipping 80 degrees NNW intersected the base of an overhang giving rise to a slab of rock positioned in an unstable state (see figure 6). E
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> The incessant rain for the past few months reduced further the cohesive strength between the parent cliff and the overhang. Regular vibrations caused by blasting activities in the quarry about 50 to 100 metres away further aggravated the situation and on the morning of 29 December 1987, the supporting forces holding the overhang gave way. F
>
> The first rockfall upset the equilibrium of the eastern face, triggering off a chain of massive rockfalls along the unstable eastern face of Gunung Tunggal (see figure 7).

He disagreed with Mr Pakianathan's finding that the collapse was caused by a rockburst as described in his report. According to him a rockburst is caused by highly stressed rock or rapid instantaneous release of strained energy. This could occur at a tunnel or a mine because of pressure from the mass of rock above the ground. Whereas a rockfall is caused by gravity at the point where faults normally occur, a rockburst can occur anywhere in the rock where the energy was concentrated. G

He expressed the view that Mr Pakianathan had not had the benefit of a geological plan of the area and without it he cannot locate with precision where a rockfall had occurred. The map (exh P1(a)) accompanying Mr Pakianathan's report merely showed distribution of rock debris and location of the remaining hill. It lacked such vital information as the dip direction and dip angle of the fault and no major joints or fractures were mapped out. Unlike Mr Pakianathan's, he was able to map out all positions of the various faults, fractures and major joints of the hill and details of the H I

A dip and strike direction and had incorporated these maps into his reports (Rajah 1 to 7). He had also provided in his report a reconstruction plan of the two rockfalls.

On being cross-examined he agreed that he had never ruled out vibration from blasting could have caused the collapse but maintained that B primary factor was attributable to natural causes. There could be secondary factors, ie factors that hasten the collapse such as weathering. He admitted however, that he did not investigate how much the quarrying may have affected the stability of the hill.

What then was the cause of the collapse of the hill?

C It is clear that there was a divergence of opinion between the experts in respect of the cause of the collapse of the hill. While the plaintiff's expert had attributed the collapse directly to the vibrations from the first defendant's quarry, the defendant's experts attributed it to the latent defects of the hill itself as manifested in the many faults and joints and unstable D overhangs which ultimately over a period of time would lead to its collapse, the vibrations from the quarry operations being merely a secondary factor which may have aggravated the collapse.

The law: requirement of the causa causans in tortious liability

E In order to find a defendant liable in negligence or nuisance or for that matter for any tortious acts, the plaintiff must prove that the defendant's act was the effective cause of the injury or damage suffered.

This first principle of tortious liability in English law had been applied in our jurisprudence over a hundred years ago by the Straits Settlements F Court of Appeal in *Vermont & amp; Ors v Prye River Dock Co Ltd* (1884) 1 Ky 658 [(Sidgreaves CJ, Ford and Wood JJ)] wherein it was held that a repairer of a boat was not liable in negligence to the plaintiff although he had been found to have been negligent in the execution of repair to the boat when it sunk. It was found as a fact that the repairer had been negligent only in respect of that part of the boat above the water-line and the sinking could G not therefore be attributed to his negligence. The fact that his negligent workmanship on that part had necessarily hastened the sinking of the boat when the water reached the water-line in the process would not make him liable — unless the sinking could be shown to be attributable to the defect as a prime cause.

H In the former Federal Court case of *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99, the plaintiff had sued the defendant, adjoining owner of a tin mine in negligence for allegedly discharging tailings into his fish pond thereby causing the demise of the fish and loss to him. There was a probability that the fish had been poisoned by poachers or that there could also have been an epidemic or that the water in the pond itself might have I been polluted by numerous and diverse means. It was held that the plaintiff cannot succeed in negligence as he had not established the 'cause and effect' of the demise of the fish.

The principle in *Guan Soon Tin Mining Co* was applied in the later Supreme Court case of *Sundram v Arunjunan & Anor* [1994] 3 MLJ 361 at p 371. In that case the Supreme Court had to decide whether the head injuries suffered by the claimant in a vehicle accident was caused by his fall to the ground as a result of the prior collision with the respondent's motor cycle in which case it would be legitimate to conclude that his head injury was attributable to the latter's negligence. Speaking for the Supreme Court on this point, Edgar Joseph Jr SCJ said:

> In the present case, we are of the view that — in the words of Lord Wright in *Caswell*'s case — there were no objective facts from which it could be inferred, as a matter of reasonable probability, that the plaintiff had sustained the head injury as a result of falling to the ground following the prior collision with the other motorcycle. We accept, however, that upon the evidence, it was *possible* that he had sustained the head injury in that way. It was equally possible that he had not. So there was insufficient evidence to connect the head injury with the other motorcycle. In this context, we are reminded of the words of Suffian FJ (as he then was) in *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 at p 103 col 2E–F:
>
>> 'There was no positive proof, as there was in the *Grand by* case (1923) 87 JP 105; 21 LGR 329 that the discharge from the defendant's mine had anything to do with the death of, the fish; there was only a possibility.' (Emphasis added.)
>
> With respect, it would therefore be a pure conjecture or a mere guess, to say that the plaintiff's head injury had been caused as a result of his falling to the ground following the prior collision with the other motor cycle. And, it is axiomatic that the court is not entitled to guess.

The principle can be better understood by referring to para 2–10 of *Clerk & Lindsell on Torts* 17th Ed 1995, at p 45:

> Tests of causation the 'but for' test. The courts are concerned, not to identify all of the possible causes of a particular incident, but with the effective cause of the resulting damage. It has been said that the law seeks the causa causans (effective factor) rather than the causa sine qua non (factor (s) without which the damage could not have occured). In pursuit of the sometimes elusive effective cause the test commonly propounded is the famous [or infamous] 'but for' test. Would the damage of which the plaintiff complains have occured 'but for' the negligence (or wrong doing) of the defendant? Or to put it more accurately, can the plaintiff adduce evidence to show that it is more likely than not, more than 50 per cent probable, 'but for' the defendant's wrongdoing the relevant damage would not have occured.

Evaluation of the evidence of the experts

Having heard the geologists Mr Senathi Rajah and Mr Chow Weng Sum, I am convinced that a rockburst is different from a rockfall. Rockburst describes the mechanic of the sudden release of energy which was accumulated in a rock formation, whereas rockfall describes merely the resulting fall of the rock due to gravity. The difference between the two had been explained by Mr Senathi Rajah by way of reference to the terminology described in *Glossary of Geology* by Ian Campbell, a publication of the

American Institute of Geology which I would have to accept as correct and accurate:

> rockburst — A sudden and often violent breaking, expulsion burst of a mass of rock from the walls of a quarry, tunnel, mine or other near—surface or underground opening, caused by failure of highly stressed rock and the very rapid or instantaneous release of accumulated strained energy, often with closure of or projection of broken rock into the opening and accompanied by ground tremors, rockfalls and air concussion. Rockbursts are not likely to occur until a depth of 1000 metres (about 3000 feet) below the surface is reached.
>
> rockfall — (a)the relatively free falling or precipitous movement of newly detached segment of bedrock (usually massive homogeneous or jointed) of any size from a cliff or other very steep slope; it is the fastest-moving landslide and is most frequent in mountain areas and during spring when there is repeated freezing and thawing. Movement may be straight down, or a series of leaps and bounds down the slope; it is not guided by an underlying slip surface
>
> (b)the mass of rock moving in or moved by a rockfall; a mass of fallen rock.

Considering that the collapse did not occur when the quarrying was in operation, but six days after it had shut down for the New Year holidays, Mr Pakianathan's postulation does not in my view explain how the energy from the blasting (which according to him 'became energised' at the fault where the hill collapsed) could have been stored at the site for that long (six days) — to have led to the rockburst that caused the collapse. His finding that the collapse of the hill was due to rockburst as he explained it, in my view would be tenable only if the collapse had occured while quarrying was in progress at the time, but not when the quarry was not in operation.

On the other hand the postulation of Mr Chow Weng Sum was fairly straight forward, firm in reasoning and is consistent with the fact that the collapse occured while the quarry was not in operation. It was also a product of a careful and unbiased and independent study commissioned by a government department which commenced only hours after the collapse and obviously undertaken without any forethought of litigation.

Having found Mr Chow Weng Sum's evidence as the more acceptable, I must conclude that the collapse was less likely to have been brought about by any sudden release of stored energy described as rockburst than by the call of gravity on the inherently unstable hill, a process described as rockfall by Mr Chow Weng Sum.

I am therefore unable to come to a finding that the causa causans of the collapse of the hills was the vibrations from the operation of the first defendant's quarry. The fact that it may be a contributory cause is not enough — it must be the prime cause as *Vermont & amp; Rivers and Ors v Prye River Dock Co Ltd* had ruled. Neither would a mere possibility suffice as the case of *Guan Soon Tin Mining* and *Sundram v Arujunam & Anor* had decided.

On this ground alone, the plaintiff's claim would have to fail.

Whether the first defendant had breached the duty of care

But even assuming that the causa causans is established in this case, the plaintiff must still prove on a balance of probability that the first defendant had breached his duty of care.

It is to be envisaged that by its very nature that the operation of a quarry has to be undertaken by a person with some degree of skill and competence in the field. In order that others are not unnecessarily exposed to danger, a quarry operator is therefore expected to maintain a certain standard of operational safety consistent with the standard shown in the profession. To quote McNair J in the oft-cited case of *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 at p 586:

> ...Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

Nearer home, the same test was applied by the Brunei High Court in *Haji Hassan bin Munap v Petrodril (B) Sdn Bhd* [1988] 1 MLJ 388 as at p 389, where the court had to decide on the duty of care of the operator of barges in the open sea in the oil business, wherein O' Connor J said:

> ...The standard of care demanded from the defendants is what was reasonable in the light of what was known, or should have been known to the defendants at the time of the accident. A relevant factor is the standard set by reputable bodies in this field, and the practice of the trade.

The question of whether or not the operator in the instant case had breached his duty of care would therefore have to be assessed on the basis of what a reasonably skilled competent man undertaking a quarry operation of the class similar to the first defendant's, would do or would not do in order to avoid harm to his neighbour. It begs of the question of what conduct is reasonably expected of him under the circumstances, and whether he had measured up to that required standard.

According to the mining engineer, Mr S Pakianathan, in his report:

(a) The rockburst on 29 December 1987 at the eastern flank of Gunung Tunggal was due to continuous unidirectional (W-E) towards (Lot 32752) quarrying, (a term which includes blasting and excavation) which resulted in an elongated narrow span limestone block with high stress concentration zone.

(b) As the quarrying progressed on an easterly direction towards Lot 32752 and the Ipoh Kampar Road, no due consideration was given by the operator or the state authority to the safety or remedial aspect of the operation.

(c) The factor of safety of the eastern flank of Gunung Tunggal could have been increased by the removal of material from the top of the slope in the form of benching or by lessening the gradient of the slope.

(d) Throughout 1987 the faults and fracture zones were exposed but yet no de-stressing of working faces or of the eastern flank was carried out. De-stressing could have been simply accomplished by drilling holes 10 feet deep into the rock on 5 feet centres and fracturing the rocks, in place, by moderate size charges.

(e) No safety precautions were taken on the eastern flank of Gunung Tunggal adjoining Lot 32752 to clear loose rocks and maintain ditch line to drain excess water during storm.

(f) The mechanism of rockburst at Gunung Tunggal on 29 December 1987 commenced at the centre of Gunung Tunggal between two faults plain with fractured zones running parallel to the direction of quarrying.

(g) No reason had been given by the State Authority for allowing Gunung Tunggal to be quarried in 1987 even though the distance of the quarry face to the Ipoh Kampar Road was less than 200 metres.

(h) It appears that the quarrying operation was continued in 1987 with the sole objective of causing the collapse of the remnant limestone blocks and to enable the whole of Gunung Tunggal to be removed as rock material.

Mr Pakianathan came to the conclusion:

(i) that the quarry face has been developed in a manner that posed maximum danger to the agricultural Lot 32752 and the Ipoh-Kampar Road.

(ii) the rockburst on 29 December 1987 could have been foreseen as early as 1 January 1987 when the permit to extract rock material under s 70 of the National Land Code was issued by the State Authority.

(iii) the rockburst and subsequent damages to Lot 32752 could have been prevented if proper safety precaution and remedial action had been taken by the quarry operator.

On the other hand, the first defendant's director, Tan Swee Hoe, who had physically worked the quarry himself for five long years before the incident had maintained he had exercised due care in his operation. He said that basically the limestone quarries in the Ipoh area employed two methods to break the rocks from the hill — the jack hammer drill method and the crawler drill method. He had all along been using the jack hammer method as most small scale limestone quarry in Ipoh area did. Initially, he had to start from the top of the hill. He would drill a hole 1 inch in diameter to a depth of 10 to 13 feet. He would then place explosives of approximately 100 grammes in the hole. In the initial stage he had to drill ten holes 10 to 20 feet apart between each hole. After putting explosives in the holes he would then detonate the explosive to create the initial bench from where later operation could be worked from. He would then clear the limestone debris. Thereafter the drillings are done on the bench downwards until the ground level. He emphasised that the charges used was a mere 100 grammes as opposed to one kilogramme if the crawler drill method was used. He had chosen the less productive jack hammer method because it was economical, and the blast from the explosives was less intense than from the crawler drill and therefore much safer. There was no law requiring him to submit a quarry scheme at that time.

A It must be appreciated right from the start to come to a finding that the operator had breached the duty of care owed by him to the plaintiff, it is incumbent on the plaintiff to establish what the standard should have been. Then and only then would it be possible to assess whether there had been a breach of that duty. In this respect it may be appropriate to recall the guidance given by Lord Loreburn LC in *Owners of Ship Swansea Vale v Jessie Mary Rice & Millicent Rice (an infant)* [1912] AC 238 at p 239, as applied B by the Supreme Court in the *Sundram v Arujunam & Anor*:

> ... What you want is to weigh probabilities, if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities at their respective value, the one against the other.

C A breach of such a duty of care cannot be established by merely enumerating what the operator had failed to do and what he ought to have done. In the words of Abdul Malek Ahmad JCA in *Dr Chin Yoon Hiap v Ng Eu Khoon & Ors and other appeals* [1998] 1 MLJ 57 at p 76–77, when speaking for the Court of Appeal on the standard of care expected of a medical practitioner in a claim in medical negligence: D

> Lord Fraser of Tullybelton said in *Whitehouse v Jordan & Anor* [1981] 1 WLR 246 at p 263 that merely to describe something as an error of judgment tell us nothing about whether it is negligent or not. The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and E type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand it is an error that such a man, acting with ordinary care, might have made, then it is not negligent.

In the instant case while the mining engineer had expressed an opinion that the quarry was developed in a manner that had exposed the maximum F danger to the plaintiff's land and that the operator had failed to take any remedial measure that would prevent the collapse of the hill, no evidence was forthcoming with regard to the standard of care that was required of a reasonably competent operator so as to enable the court to reach a finding whether the first defendant had breached his duty of care. How far could the hill be developed (going by the objective standard of the competent and G careful operator) that could be considered safe and would not expose the plaintiff's land to maximum danger? Would a reasonably competent quarry operator of the same class and in the same position as the first defendant been reasonably expected to have undertaken the remedial measures as suggested by the mining engineer? The first defendant had used the minimal amount of explosive, had quarried from the top of the hill H downwards and had in the process created the required benches and had removed the debris after each operation. Was he required to do more? Without any evidence of what a reasonably competent operator would have done under the circumstances, I am not in the position to make any assessment whether the first defendant had been careless in operating his quarry and in falling to take such remedial measures. I

Notwithstanding the opinion of the mining engineer on the short-comings of the operator, I cannot come to any conclusion that he had

A breached his duty of care. The failure to follow the JKR guideline in not having a quarry less than 200 metres from a road may not of itself constitute a negligent conduct in the absence of any acceptable explanation of the precise objective of the guideline. The opinion of the mining engineer at best merely shows that a higher standard of safety could have been expected by the operator without answering the crucial question of whether he had B observed a reasonably safe standard.

Further it would appear that the mining engineer had not determined positively what method of quarrying was employed by the operator and what amount of explosive was used for each detonation to determine whether the strength of vibrations from the quarry would be sufficient to C cause the collapse. He had merely generalised by comparing the strength of the vibration at the defendant's quarry to be more or less the same as the strength of vibration found in a study conducted by the Mines Research Institute in 1989 in respect of a limestone quarry in Padang Rengas to come to the conclusion that blast was strong enough to cause the hill to collapse. But the question that has to be answered is what was the actual strength of D vibration generated by the explosive used by the operator and whether it was sufficient to cause the collapse and generally whether he had departed from the accepted industry standard of safety in using the explosive in the way he described, in the face of the claim of the operator that he had used the minimal amount of explosive and that his method of quarrying was safe.

E

Has the plaintiff a cause of action in nuisance?

Having ruled on the plaintiff's claim in negligence, I shall now consider his alternative claim in nuisance.

It was contended by counsel of the plaintiff, Mr Chan Kok Keong, that F in the event the plaintiff's main claim in negligence fails, the first defendant may still be liable in nuisance. On this score learned counsel relied on the English Court of Appeal case of *Leakey & Ors v National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 All ER 17.

In that case the plaintiffs were the owners of two houses at the base of G the hill. The land on the hill belonged to the defendant and was composed of soils which made it peculiarly liable to cracking and slipping as a result of weathering. For many years there had from time to time been slides of soil, rocks, trees and other debris falling onto the plaintiff's land from the hill due to natural weathering. In 1976 following a prolonged summer followed by an unusually wet autumn as a result of natural weathering, one of the H plaintiffs having discovered that a large crack had opened up on the bank of the hill behind her house, informed the defendant of the occurence. Some weeks later a large fall of the bank occured causing earth and debris to be deposited on her land and subjecting her to the risk of further falls. The defendant refused to clear the debris and to procure remedial work on the bank to prevent further fall.

I

It was held by the Court of Appeal (affirming the decision of the High Court) inter alia, that a person on whose land a hazard naturally occured, whether in the soil itself or in something on or growing on the land, and which encroached or threatened to encroach onto another's land thereby threatening to cause damage, was under a duty, if he knew or ought to have known of the risk of encroachment, to do what was reasonable in the circumstances to prevent or minimise the risk of the known or foreseeable damage or injury to the other person or property, and was liable in nuisance if he did not.

Leakey's case, I must admit had taken the English common law of nuisance to a higher step of development, taking the cue from the earlier Privy Council case of *Allan William Goldman v Rupert William Edeson Hargrave & Ors* [1967] 1 AC 645. Before *Leakey*, the position was different. Nuisance was merely a cause of action of the English common law which may be broadly defined, as an act or omission which is an interference with, disturbance of or annoyance, to a person in the exercise or enjoyment of his ownership or occupation of land or of some easement, profit or other rights used or enjoyed in connection with land. Until the decision in *Leakey* a harm originating in some natural condition of land and not the effect of human activity was not generally actionable as a nuisance.

The following paragraph from the 1995 17th Ed of *Clerk & Lindsell on Tort* at para 18-17 clarifies the point:

> Natural Nuisance — It used to be thought that harm originating in some natural condition of land and not the effect of human activity was not generally actionable as a nuisance, and certain older cases indicated that this indeed was the law. But in recent times the judges have extended the boundaries of nuisance to include such natural nuisances. In *Goldman v Hargraves* the Judicial Committee of the Privy Council held that an occupier of land in Australia to be under a duty of care to abate a fire which had started by lightning striking a tree on his land and which spread to his neighbour's land. It was recognised that the law on this question was not static and that the decision represented a step in extending the responsibilities of landowners towards their neighbours, Lord Wilberforce saying, 'It is only in comparative recent times that the law has recognised an occupier's duty as one of a more positive character than merely to abstain from creating or adding to, a source of danger or annoyance'. The development was taken a large step further by the Court of Appeal in *Leakey v National Trust.* The National Trust owned a natural hill in Somerset which by natural forces slipped so as to damage the plaintiff's contiguous property. It was argued for the Trust that there could be no liability for such accidents of nature, and also that if there was any liability it sounded only in negligence and not in nuisance. The statement of claim did not refer eo nomine to 'negligence' but alleged breach of duty to take reasonable care to prevent the defendant's land from falling onto the plaintiff's. Megaw LJ was prepared to regard that 'as being properly described as a claim in nuisance. 'On the issue of substance the court followed *Goldman v Hargrave* both as to the existence of the duty and as to its scope and content.

Much as the *Leakey*'s case has extended the scope of the law of nuisance in England, nevertheless the court in this country is not free to adopt the *Leakey*'s case as precedent. Nuisance is a specie of the common law of England and under s 3 of the Civil Law Act 1956 the common law that has to be applied in this country is that which is understood and accepted as the common law of England before 7 April 1956.

It was contended by counsel for the plaintiff that *Goldman v Hargraves* had been applied by the former Federal Court in the *Leong Bee*'s case (which went on further appeal to the Privy Council and reported as *Leong Bee & Co v Ling Nam Rubber Works* [1970] 2 MLJ 45). Since the development of *Leakey* was brought about by *Goldman v Hargraves*, it was argued that by extention the latter must have been adopted as law in this country. Having examined *Leong Bee*, it is clear to me that what the Federal Court seemed to have adopted from *Goldman v Hargraves* was only that aspect of the law of foreseeability in nuisance — and not the overall principle in *Leakey* that a harm originating in some condition of land not the effect of some human activity was now actionable in nuisance. *Goldman v Hargraves*, it is clear to me was merely used by the English Court of Appeal in Leakey as a platform to expand the law of nuisance with respect to the liability of the occupier of land on which a natural hazard exists.

To succeed in nuisance therefore, the plaintiff in the instant case has to come within the ambit of the cause of action before *Leakey* that is to say, the cause of action as it existed in law before 7 April 1956. He is obliged to prove that the harm he suffered is the effect of the defendant's activity and not the latent defect of the limestone hill. Having failed to prove conclusively that the collapse of the hill was caused by the quarrying operation of the defendant, it follows that he would also fail in nuisance. His only recourse would be an action in negligence.

But even assuming that *Leakey* represents the correct proposition of the law of nuisance in this country, the plaintiff would still have to prove that the defendants knew or ought to have known that the hill would collapse and having known of it had not done what was reasonable under the circumstances to prevent or minimise the risk of foreseeable damage to the plaintiff's land. Such a knowledge which could bring plaintiff's claim in nuisance was clearly not in evidence. Unlike in the *Leakey*'s case, the occupier was not brought to notice that there was a latent defect in the hill. It may be argued (rightly or wrongly) that it should be within the foreseeability of the quarry operator that the hill may collapse — but to succeed under the Leakey principle the plaintiff must prove knowledge and not merely the forseeability that the hill would collapse.

The claim against the third defendant, the Director of Land and Mines

The defence of the third defendant is basically two pronged. Firstly, he contended that the power to grant the permit under s 70 of National Land Code does not carry with it the responsibility to supervise the operational aspect of quarrying.

Secondly, it was contended that even if he could be held liable (which was denied) the plaintiff would still be prevented from seeking relief or damages from him under the Public Authorities Protection Act 1948 by reason that the hill collapsed in 1987 but the third defendant was brought in as a party only on 16 May 1992 — some four years later — in disregard of s 2(a) of the Act which reads as follows:

> Where after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect —
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

(The term 'person' as provided in the preamble means 'persons acting in the execution of statutory and other public duties'.)

Whether the Director of Land and Mines can be made liable in negligence

All the six particulars of negligence pleaded against third defendant relates to his failure to exercise supervision on the operation of the quarry — in short what the plaintiff is alleging here is a breach of his duty both statutory and under the common law to supervise the operation of the quarry.

According to the Timbalan Pendaftar Hak Milik, Perak (DW6) a senior officer familiar with the issuance of permits of the nature that was issued to the first defendant, in deciding whether to grant a licence to remove rock material under s 70 of the National Land Code the authority would only be concerned with the status of the land on which the rock material was to be removed, the quantity of rock material that would be extracted from the land, and the length of time taken to transfer of the rock material from the land as the permit would normally be valid only for a certain time. The third defendant had no function to perform with regard to the safety aspect of the quarry and in issuing the permit would not take this factor into consideration. He pointed out that a permit under s 70 of the National Land Code is issued only for the purpose of removing rock materials from land and not for the operation of a quarry.

First and foremost it is necessary to ask the question whether such a power or duty exists, under the Code, for is trite law that a breach of a statutory duty can only give rise to a private liability when the plaintiff can establish that the legislature had intended the breach of the relevant statutory duty to be actionable by an individual harmed by that breach. (See the House of Lords in *Lonrho Ltd & Anor v Shell Petroleum Co Ltd & Anor* (No 2) [1982] AC 173).

The same principle was applied by Lim Beng Choon J in *Hu Sepang v Keong On Eng & Ors* [1991] 1 MLJ 440 wherein at p 442 his Lordship said:

> From the pleadings of the plaintiff there is no doubt that he firstly pegged his cause of action on breach of statutory duty on the part of the first and second defendants. It has been said that to establish civil liability for a breach of statutory duty the plaintiff must show that: (a) the injury he has suffered is within the ambit of the statute; (b) the statutory duty imposes a liability to civil action, (c) the statutory duty was not fulfilled; and (d) the breach of duty has caused his injury — see *Clerk & Lindsell on Torts* (14th Ed) para 1581. I should

A also bear in mind that a statute may impose a duty towards person generally in which case no question can arise whether the plaintiff is within the class protected. Furthermore it is also necessary to bear in mind that where a statute confers power coupled with a duty to exercise it, failure to do so is a breach of that duty for which a remedy will lie. An interesting case advocating this proposition is the case of *Schacht v The Queen in Right of the Province of Ontario* (1972) 30 DLR (3d) 641 to which I shall revert to later in this judgment. On B the other hand, where the loss is ocassioned by failure to exercise a power coupled with a discretion there is no liability — see *Great Central Railway Co v Hewlett* [1916] 2 AC 511.

Section 70 reads as follows:

C

> Power to permit extraction, removal and transportation of rock material
>
> The State Authority may, in accordance with the provisions of this Chapter and of any rules under section 14, permit the extraction, removal and transportation of any rock material (otherwise than for the purpose of obtaining metal or mineral therefrom: — (a) State land; (b) alienated land; (c) mining land; (d) reserved land.

D

Having examined the relevant provisions with respect to the position of the Director of Lands and Mines under the National Land Code, in particular the scope of his duty under s 70, I could do no better than to agree with the submission of the learned Federal Counsel, Raja Rozela that the director owed no duty of care to the plaintiff. I am satisfied that he was concerned E only with the broad aspect of land administration in the State. I am certain that the power conferred under s 70 had been framed by the legislature purely for the regulation and control of land use and since a fee is prescribed, probably also for the collection of revenue. This is certainly far from the notion that the purpose of the permit under s 70 was meant for the protection of the safety or property of a person in the position of the plaintiff F and therefore provides him with a cause of action in statutory negligence in the event of a breach.

Further I would also accept the opinion of the timbalan pendaftar hak milik that the permit was issued by the relevant officer only in respect of the removal of rock materials from land and not for the operation of a quarry. G I am unable to find any provision in the code that confers on him the power, less so the duty to supervise the operation of a quarry. I am therefore bound to decide that the third defendant, the Director of Land and Mines did not owe the plaintiff any statutory duty of care in respect of any permit issued by his officers. It follows that the plaintiff's claim against him must fail.

H But the matter does not end there. Counsel for the plaintiff had relied on the House of Lords case of *Anns & Ors v London Borough of Merton* [1977] 2 All ER 492 as persuasive authority that while a statutory body conferred with the power (but not the duty) to supervise may not be under a statutory duty of care, it may still be possible to attribute the common law duty of care to it.

I In that case, the London Borough of Merton was conferred with the power to supervise and control the construction of buildings by a series of bye-laws made under the Public Health Act 1936. The Act and the bye-laws however, did not impose on the borough the duty to inspect the foundation A work of buildings. Nevertheless, it was held that the borough may still owe a common law duty to take reasonable care to ensure that a builder does not cover up the foundation which did not comply with the bye-laws; in failing to carry out inspection of the foundation, they had failed to exercise their duty properly and was therefore liable to the occupier under the common law in negligence when cracks and other structural defects occured as a B result.

The *Anns* case had in fact fine-tuned the duty of care situation with respect to cases where the statute itself did not provide a statutory body with the duty but merely with the power and discretion to supervise a particular undertaking under its charge. But it is clear to me that the principle in *Anns* C has no relevance here. Whereas in the *Anns* case the Borough of Merton was conferred with the power to supervise the construction of buildings, the Director of Land and Mines in the instant case was merely conferred with the power to issue the permit without the power nor the duty to supervise the removal of rock materials. It follows that that no duty of care to ensure that the rock materials were adequately supervised under the common law D could exist under the circumstances.

Whether the Director of Land and Mines can be made liable in nuisance

It would appear that there had been an oversight on the part of counsel who E settled the plaintiff's pleading as to the proper cause of action that should have been pursued in this case against the director along with the first and second defendants in nuisance — as it was plain and obvious that the director cannot be made liable in nuisance as he was neither the occupier of the land from where the nuisance was alleged to have originated nor was he the cause of it. F

Whether the plaintiff was out of time

Notwithstanding the clear letters of s 2(a) of the Public Protection Act 1948, counsel for the plaintiff maintained that the damage suffered by the plaintiff in this case had not ceased and was still continuing at the time the G suit was filed and therefore was within the ambit of the proviso 'a continuance of injury or damage, within 36 months' in s 2(a) of the Act.

I find counsel's argument untenable.

A continuing cause of action has been defined in *Hole v Chard Union* (1894) 63 LJ Ch at pp 469–470 by Lindley, Smith and Davey LJJs 'as a H cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought.' It is clear to me that there was no repetition of the acts either in negligence or nuisance, after the collapse of the hill on 29 December 1987. The situation in the instant case must be distinguished from the decision of Wan Suleiman J in *Mak Koon Yong & Anor v Municipal Councillors Malacca* [1967] 1 MLJ 256 where His I Lordship had to decide whether a claim made by the plaintiff for damages arising out of the councillor's neglect to approve a building was made after

A the limit of three years set by s 2(a) of the Act. The plaintiff in that case had submitted an amended plan before the expiry of the limitation period. His Lordship found that there was a continuance of the councillor's neglect to approve a building over the three years as the neglect to consider the amended plan constituted a repetition of the neglect of the Commissioners and therefore came within the proviso of s 2(a) of the Public Authorities B Protection Act 1948.

The decision

Having failed on both negligence and nuisance, the plaintiff must now bear the consequence of having his suit against the defendants dismissed with C costs.

Action dismissed.

Reported by Jafisah Jaafar

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